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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

IV. Construction of Constitutions

D. Construction to Determine Operative Effect

2. As Self-Executing or Not Self-Executing

a. In General

§ 102. Definition, nature, and effect of self-executing provisions of constitutions

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  640

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Implied cause of action for damages for violation of provisions of state constitutions. 75 A.L.R.5th 619

A constitutional provision is self-executing if no legislation is necessary to give effect to it¹ and if there is nothing to be done by the legislature to put it in operation² unless a contrary intent is clearly shown.³ A court can determine that a constitutional provision was intended to have immediate effect, and thus is self-executing, when the provision is both judicially definable and enforceable, even though its express language may be stated in relatively general terms.⁴ For instance, a constitutional provision is self-executing if it provides sufficient direction by which the right at issue might be protected.⁵ To be self-executing, a constitutional provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection.⁶ Thus, usually no legislation is required to effectuate a constitutional provision that is prohibitory in its language.⁷ However, the mere fact that a constitutional provision is prohibitory is not enough to demonstrate

it is self-executing, as required for a private right to sue for damages.⁹ Conversely, the failure of the legislature to act cannot take away a right constitutionally granted.⁹

A constitutional provision addressed to the legislature is nonself-executing.¹⁰ Likewise, a constitutional provision is not self-executing if it merely states a general principle without establishing any basis on which that principle may be enforced.¹¹ For instance, the protections of the Fifth Amendment are generally not self-executing.¹²

It is a well-established rule that constitutional provisions contemplating and requiring legislation to enforce them are not self-executing¹³ and remain inoperative except as implemented by appropriate legislation which carries out the general spirit and purpose of the provisions.¹⁴ A constitutional provision which assumes the existence of certain machinery to carry it out is not self-executing where the machinery previously provided by the legislature is not geared to the carrying out of the particular constitutional mandate.¹⁵ Even if a constitutional provision contains a mandatory requirement that the legislature adopt a particular provision, there is no remedy if the legislature fails to obey such constitutional mandate.¹⁶ However, the command of a constitutional provision which is not self-executing remains in force, even though it is for the legislature to choose the time and form for carrying out the command.¹⁷

A constitutional provision may be self-executing in one part and not self-executing in another part.¹⁸

It has been said that a court's ability to award damages for violation of a self-executing constitutional provision rests on the common law.¹⁹ Courts may give effect to a constitutional provision without implementing legislation, as required for a private right to sue for damages, if the framers intended the provision to have immediate effect and if no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.²⁰ When inquiring into whether a constitutional provision is self-executing, as required for a private right to sue for damages, courts ask whether the framers intended the provision to have immediate effect without implementing legislation or whether instead its terms would be understood as a general principle or line of policy requiring a legislative act to put it into effect.²¹ However, a determination that a state constitutional provision is self-executing does not necessarily mean that monetary damages are the proper remedy for a violation.²²

Observation:

The fact that a self-executing constitutional provision is operative without the need for supplemental legislation means that the provision is enforceable in a common-law action.²³ On the other hand, a challenge to a constitutional provision that is not self-executing fails to present a justiciable issue because the provision does not create a privately enforceable right.²⁴

2 In re Protest Filed by Citizens for Merit Selection of Judges, Inc., 49 Ohio St. 3d 102, 551 N.E.2d 150 (1990).
3 Ordinarily, a self-executing constitutional provision does not contain a directive to the legislature for further
4 action. Zullo v. State, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
5 McDougall v. Marin County, 208 Cal. App. 2d 65, 25 Cal. Rptr. 197 (1st Dist. 1962).
6 Harvey v. Ute Indian Tribe of Uteah and Ouray Reservation, 2017 UT 75, 416 P.3d 401 (Utah 2017), cert.
7 denied, 139 S. Ct. 784, 202 L. Ed. 2d 567 (2019).
8 Zullo v. State, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
9 Zullo v. State, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
10 § 107.
11 Kuchcinski v. Box Elder County, 2019 UT 21, 450 P.3d 1056 (Utah 2019).
12 Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).
13 Montana Independent Living Project v. Department of Transportation, 2019 MT 298, 398 Mont. 204, 454
14 P.3d 1216 (2019).
15 Zullo v. State, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
16 State v. Welchman, 292 Neb. 227, 871 N.W.2d 768 (2015).
17 Moosa v. Abdalla, 248 La. 344, 178 So. 2d 273 (1965).
18 As to tests to determine whether provision is self-executing, see §§ 105 to 107.
19 Uhlmann v. Conway, 277 A.D. 478, 101 N.Y.S.2d 4 (3d Dep't 1950).
20 O'Neill v. White, 343 Pa. 96, 22 A.2d 25 (1941).
21 Ursuline Academy of Cleveland v. Board of Tax Appeals, 141 Ohio St. 563, 26 Ohio Op. 152, 49 N.E.2d
22 674 (1943) (overruled in part on other grounds by, Denison University v. Board of Tax Appeals, 2 Ohio St.
23 2d 17, 31 Ohio Op. 2d 10, 205 N.E.2d 896 (1965)).
24 Palmer v. Board of Education of Union Free School Dist. No. 2, Town of Geddes, Onondaga County, 276
N.Y. 222, 11 N.E.2d 887 (1937).
18 In re Assessments For Year 2003 of Certain Properties Owned by Affordable Residential Communities 7,
L.L.C. and Affordable Residential Communities 8, L.L.C., 2006 OK CIV APP 147, 150 P.3d 399 (Div. 2
2006).
19 Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d
533 (Utah 2000).
20 The fact that a constitutional provision is self-executing does not necessarily mean that monetary damages
21 are proper remedies for its violation. Shields v. Gerhart, 163 Vt. 219, 658 A.2d 924 (1995).
22 Kuchcinski v. Box Elder County, 2019 UT 21, 450 P.3d 1056 (Utah 2019).
23 Kuchcinski v. Box Elder County, 2019 UT 21, 450 P.3d 1056 (Utah 2019).
24 Zullo v. State, 2019 VT 1, 205 A.3d 466 (Vt. 2019).
23 Gray v. Virginia Secretary of Trans., 276 Va. 93, 662 S.E.2d 66 (2008).
24 Developmental Pathways v. Ritter, 178 P.3d 524 (Colo. 2008).